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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

BRUCE ARGO,

Petitioner,

versus

ROBERT H. BUTLER, SR.,
WARDEN LOUISIANA STATE PENITENTIARY,

Respondent.

On Petition For Writ Of Certiorari To The United States District Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATUTE 1

SUMMARY OF THE ARGUMENT 1

STATEMENT OF THE CASE 2

(a) Course of Proceedings 2

(b) Statement of Facts 2

ARGUMENT 4

CONCLUSION 10

TABLE OF AUTHORITIES

Page

STATE V. ARGO, 476 So.2d 409 (La.App.2d Cir. 1985) writs denied 481 So.2d 1347 (1986)..... 2

STATE V. GUINN, 319 So.2d 407 (La. 1975)..... 7

JACKSON V. VIRGINIA, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)..... 9

ROCHIN V. CALIFORNIA, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952)..... 5

WHALEN V. UNITED STATES, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)..... 5

LOUISIANA REVISED STATUTES

LSA R.S. 14:19..... 1, 5, 6, 9, 10

LSA R.S. 14:20..... 5, 6, 9

LSA R.S. 14:27..... 4

LSA R.S. 14:30..... 4

STATUTE

La. R.S. 14:19:

The use of force or violence upon the person of another is justifiable, when committed for the purpose of preventing a forcible offense against the person or a forcible offense or trespass against property in a person's lawful possession; provided that the force or violence used must be reasonable and apparently necessary to prevent such offense, and that this article shall not apply where the force or violence results in a homicide.

SUMMARY OF ARGUMENT

The State of Louisiana has the sole authority to define state criminal offenses and any defenses allowed to those crimes. The State has a compelling, legitimate interest in providing for different standards of self-defense in cases involving homicides and cases with a surviving victim, and for providing that, in a non-homicide, self-defense is only allowed where the victim was a "forcible offender."

The trial court properly charged the jury under La. R.S. 14:19, applicable under the facts of the case, providing for self-defense in a non-homicide case.

Petitioner in fact presented a self-defense argument to the jury, and was not prejudiced by the complained-of jury charge.

STATEMENT OF THE CASE

(a) Course of Proceedings

Petitioner, Bruce Argo, was convicted in the First Judicial District Court of Louisiana, Caddo Parish, of the attempted first-degree murder of Police Officer Donald Slauson and was sentenced to forty years at hard labor. On appeal, petitioner's conviction was affirmed by the Louisiana Second Circuit Court of Appeal in *State v. Argo*, 476 So.2d 409 (La. App. 2d Cir. 1985) and writs were denied by the Louisiana Supreme Court at 481 So.2d 1347, Case 2 (1986).

An application for writ of *habeas corpus* was filed in the United States District Court in the Western District of Louisiana, Shreveport Division, and was denied February 8, 1988, by Judge Tom Stagg pursuant to the Report and Recommendation of the Magistrate filed January 20, 1988. On appeal to the United States Court of Appeals, Fifth Circuit, a certificate of probable cause was denied May 23, 1989. Petitioner filed the instant application for writ of certiorari. (The lower court opinions were made part of petitioner's application.)

(b) Statement of Facts

In the early morning hours of October 31, 1983, Shreveport Police Officer D. L. Slauson was shot in the face by a shotgun blast while investigating suspicious activity in the parking lot of the Hillside Apartments in Shreveport, Louisiana. Subsequent investigation revealed the following facts which led to the arrests of James H. Edwards, John Durr and Bruce Argo, petitioner herein.

The three aforementioned young men stole a pickup truck which they used for an out-of-town hunting trip. When they arrived back in town they stole another pickup truck on the Wallace Lake Road in Shreveport, around 7:00 p.m. on October 30. After a few hours, they proceeded to the Colony Square Apartments on Colquitt Road where they attempted to steal another automobile. When they were interrupted by a man and a woman (Robert Cummings and his girl friend), Durr drew a .22 caliber derringer on the couple and Bruce Argo threatened them with a .12 gauge shotgun as the threesome made their escape in the truck, offering to "blow Cummings' head off."

An off-duty Shreveport police officer who worked at the Colony Square Apartments as security guard saw petitioner in the bed of the truck, gun in hand, with a blanket over his shoulders. The officer and Cummings drove around looking for the stolen truck, after the Caddo Parish Sheriff's Office had been notified of the incident. A Sheriff's deputy, Paul Hough, saw the stolen truck with two white males in the cab and chased it at high speed, but lost it.

The three young men next proceeded to the Hillside Apartments where they parked the truck in the parking lot. Shreveport Police Officer Slauson had heard the first report of the stolen truck and proceeded to where he believed he had seen the red truck earlier. He pulled into the parking lot of the Hillside Apartments. Durr spotted the patrol car first and alerted the others. They hid in the truck, Durr and Edwards in the cab and Argo in the bed. Officer Slauson ordered Durr out of the truck and told him to put his hands on the front of the truck. Slauson

next spotted Edwards inside the vehicle and ordered him out. As he was sliding out of the truck, Edwards cocked a stolen .357 Magnum revolver which was concealed from the officer's view. As he exited the truck, Edwards fired both rounds of his revolver at Officer Slauson to cover his escape. Slauson fell backwards and scrambled for cover behind the safety of another automobile, managing to fire five shots in his own defense. Slauson then began to radio for help over the next several minutes of quiet. At that point, Argo, who had remained hidden in the bed of the truck, fired the .12 gauge shotgun which struck Slauson in the face, blinding him. The defendants fled the scene but were apprehended in the nearby vicinity a few hours later. Durr and Edwards gave complete, recorded inculpatory statements.

Argo was charged by bill of information with the offense of attempted first-degree murder in violation of La. R.S. 14:30 and 14:27. After entering a plea of not guilty and not guilty by reason of insanity, petitioner went to trial. A twelve-person jury found appellant guilty as charged. Argo was sentenced to serve forty years at hard labor.

ARGUMENT

VIOLATION OF EQUAL PROTECTION/DUE PROCESS

Petitioner's main area of attack upon his conviction centers on the fact that the trial court charged the jury

pursuant to La. R.S. 14:19[1] regarding self-defense in cases where death does not result, rather then La. R.S. 14:20[2] regarding self-defense in homicide cases. Petitioner argues that Louisiana's statutory scheme of self-defense therefore treats unequally offenders "charged with the same crime under the same circumstances." Petitioner seems to regard the death or survival of the victim of the violent attack as a mere incidental circumstance which is not of compelling interest to the State in its decision to permit pleas of self-defense. Such a position is untenable.

The discretion to define criminal offenses, their punishment and defenses, if any, resides entirely with the State's legislature. *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

To show a violation of equal protection, petitioner must either show that he is a member of a suspect class or that a fundamental right is involved to invoke strict scrutiny of the legislation. He has demonstrated neither.

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[1] La. R.S. 14:19 The use of force or violence upon the person of another is justifiable, when committed for the purpose of preventing a forcible offense against the person or a forcible offense or trespass against property in a person's lawful possession; provided that the force or violence used must be reasonable and apparently necessary to prevent such offense, and that this article shall not apply where the force or violence results in a homicide.

[2] La. R.S. 14:20 A homicide is justifiable: (1) When committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger . . .

Attempted murderers are not a suspect classification, nor does petitioner have a fundamental right to attempt to kill a police officer.

The classifications involved bear a rational relationship to the legislative purposes: that is, discouraging "self-defense" where excessive force is used beyond that reasonably necessary.

The life or death of the victim, which determines what charges, defenses and sentences are applicable, is hardly an arbitrary factor. The real difference, as far as petitioner is concerned, is that 14:19 refers to self-defense against a "forcible offense," where 14:20 makes no such provision. The victim in this matter was a uniformed police officer acting in the line of duty, not a "forcible offender." The safety of peace officers (and non-violent citizens) is, again, not an arbitrary factor. Criminal offenders, such as petitioner, cannot be allowed to use force against a peace officer who himself has not exceeded the reasonable exercise of force in the pursuit of his duty, and then plead self-defense.

Petitioner presents a number of hypotheses which, he argues, shows that the Louisiana statutory scheme is a violation of due process. Several of these are based on the petitioner's assertion that there are apparently numerous cases where a victim is dead but the offender is only tried for attempted murder. Such a "class" would be very small, as the prosecutor has the discretion of deciding how to charge an offender. The State submits that cannot change the fact of the victim's death and the applicability of La. R.S. 14:20 to any claim of self-defense.

In pursuing his argument of unequal treatment, petitioner calls the survival or death of the victim a factor over which the defendant has no control and which occurs after commission of the crime. He seems to believe it to be as coincidental as the weather, totally unconnected to the crime, rather then the direct consequence of petitioner's intentional act.

The State of Louisiana submits that petitioner's hypotheses are disingenuous and cannot alter the fact that the State has a rational interest in setting different standards of self-defense. The State undeniably has an interest in preventing and punishing the injury or murder of its citizens.

In denying a certificate of probable cause, the Fifth Circuit Court of Appeals found no prejudice was suffered by petitioner because of the different standards of self-defense. Defense counsel argued self-defense extensively. The State submits that, no matter which standard of self-defense was charged to the jury, the State proved beyond a reasonable doubt that the shooting was not in self-defense. It is highly unlikely that a rational jury would have found otherwise.

The Louisiana Supreme Court, in *State v. Guinn*, 319 So.2d 407, 409 (La. 1975), has spoken to the difference between the self-defense statutes, and was quoted by the Louisiana Second Circuit Court of Appeal and the United States Magistrate in petitioner's case below:

> "It is clear that the statutes contemplate two different standards for two different situations. In the instance where no homicide results, as is the case here, the use of force or violence in self-

> defense is justified when *the amount used is reasonable* and it is apparently necessary to use such force to protect oneself. [14:19] On the other hand, when a homicide results from the use of force or violence, it is justified as self-defense only if the person *reasonably believed he was in imminent danger of losing his life or receiving great bodily harm* and that deadly force was necessary to save his life [14:20]."

THE STATE WAS RELIEVED OF THE BURDEN OF DISPROVING SELF-DEFENSE

Defense counsel also argues that the loss of the 14:20 self-defense instruction was devastating to his defense. The fact remains that petitioner simply was not entitled to the instruction. That is no fault of the court, the prosecutor, defense counsel or the laws of the State of Louisiana. Just because petitioner wanted the instruction does not make it applicable to the case. That did not stop him from arguing that petitioner was in fear of his life when he attempted to kill Officer Slauson, however. (Vol. 2, pp. 408-413) Defense counsel made much of the "possibility" that petitioner was asleep in the back of the truck when the shootings started, and so couldn't have know a police officer was at the scene.

In fact, the only suggestion that Argo was asleep in the back of the truck was made by defense counsel in cross-examining State's witness John Durr (Vol., 1, p. 253) who merely agreed it "was possible." This was carelessly picked up by the Second Circuit Court of Appeal in its opinion. All other facts militate against such a possibility. Only an hour elapsed between the time that Argo offered to "blow (Cummings') head off" and the time Argo

attempted to do the same to Officer Slauson. (Vol. 1, pp. 89-91) A mere twenty minutes had elapsed since Deputy Hough talked on the radio to Slauson about the stolen truck, chased the truck at high speed, lost it, and heard Slauson radio for help between Slauson's shootout with Edwards and his shooting by Argo. (Vol. 1, pp. 123-128) Slauson pulled up behind the stolen truck in a police unit, and was uniformed. He used his car's spotlight to illuminate the pickup and its vicinity and shouted instructions to Edwards and Durr to get out of the truck. Approximately two minutes elapsed between the time Edwards and Slauson exchanged gunfire and Argo's shooting of Slauson during which time Slauson, only fifteen feet away, was radioing to back-up units for help, "Officer down," that is, under fire. (Vol. 1, pp. 273-285, 256, 132, 125, 126) Argo looked out of the truck before he raised up with the shotgun and fired. (Vol. 1, pp. 243, 263)

The State bore the burden of disproving self-defense, as the above recitation of facts demonstrates. It was not impermissibly relieved of that burden by the trial court's refusal to include an inappropriate jury charge. The State believes that its proof fully meets the standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

For a plea of self-defense to be successful, a Louisiana jury, whether charged under La. R.S. 14:19 or 14:20, must believe that petitioner used only such force as was necessary to prevent injury to himself. In the case of self-defense of a homicide, the offender must have reasonably believed he was "in imminent danger of losing his life or receiving great bodily harm."

Petitioner's real complaint is the words "forcible offense" in 14:19, which, he says, makes self-defense a useless claim where the victim is a police officer. In fact, petitioner creatively argued that it was possible he did not know the victim was a police officer engaged in the exercise of his duty when he shot him. The jury obviously did not believe him.

It is, of course, not impossible that a police officer may be a "forcible offender" by using excessive force or otherwise violating criminal laws. Article 19 does not exclude the use of force or violence upon a forcible offender if he is a police officer. Petitioner is not entitled to shoot a police officer to help his friends avoid arrest for stealing trucks.

CONCLUSION

Petitioner was not entitled to the jury charge requested. The different standards of self-defense for homicide and non-homicide cases is rationally related to furthering a legitimate state interest.

Although petitioner argued self-defense, the State disproved that the offense was committed in self-defense.

WHEREFORE, the State of Louisiana submits that petitioner's writ of certiorari is without merit, does not present a federal question and should be denied.

Respectfully submitted,

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